LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 5 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

70-49

No. ~~1060~~

STATE OF HAWAII, *Petitioner*

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
UNION OIL COMPANY OF CALIFORNIA,
SHELL OIL COMPANY and CHEVRON
ASPHALT COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

BERTRAM KANBARA,
Attorney General, State of Hawaii,
GEORGE PAI,
Deputy Attorney General,
State Building,
Honolulu, Hawaii 96813,
LAW OFFICES OF JOSEPH L. ALIOTO,
MAXWELL M. BLECHER,
PETER J. DONNICI,
111 Sutter Street, Suite 1421,
San Francisco, California 94104,
Counsel for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Opinions of the court below	2
Jurisdiction	3
Questions presented	3
Statutes involved	5
Statement	6
Reasons for granting the writ	11
I. The decision of the Court of Appeals seriously weakens the effectiveness of the private action pursuant to Section 4 of the Clayton Act as a vital means for enforcing the antitrust policy of the United States	11
II. The State of Hawaii should be permitted to maintain this civil antitrust action for damages and injunctive relief in its capacity as parens patriae	14
A. The necessity of the parens patriae remedy in the present case	14
B. Georgia v. Pennsylvania Railroad Co. establishes the right of the State of Hawaii, as parens patriae, to maintain an antitrust action as alleged in count two of the amended complaint	19
III. Review of the judgment of the Court of Appeals is necessary to settle the question of the propriety of the state, suing as parens patriae, to recover damages under Section 4 of the Clayton Act	27
A. Georgia v. Pennsylvania Railroad Co. recognizes that all of the civil remedies and sanctions of the antitrust laws are available to the state in an action as parens patriae	28
B. The State of Hawaii has standing under Section 4 of the Clayton Act to maintain this action for damages, as parens patriae	36
C. The Court of Appeals erroneously ruled that the injury to the State of Hawaii was so incidental, remote and indirect as to be outside the "target area" of respondents' antitrust violation	41
IV. The petitioner, State of Hawaii, should be permitted to maintain its action under Section 4 of the Clayton Act as the representative of the interests of its citizens	48
Conclusion	52

Table of Authorities Cited

Cases	Pages
Association of Data Processing Service Organizations, Inc. v. Camp, ... U.S. ....., 90 S.Ct. 827 (1970)	43, 44
Barlow v. Collins, ... U.S. ....., 90 S.Ct. 832 (1970)	43, 44
Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251 (1946)	4, 44, 45, 47
Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2d Cir. 1958)	41
Bruce's Juices v. American Can Co., 330 U.S. 743 (1947)	11
California v. F.P.C., 296 F.2d 348 (D.C. Cir. 1961)	51
Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied 342 U.S. 919 (1952)	12
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)	40, 47
Fields Productions, Inc. v. United Artists Corp., ... F.2d ..... (2d Cir., Sept. 8, 1970)	11, 12
Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945)	passim
Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907)	21, 27, 30, 49, 50
Guam v. Fed'l Maritime Comm., 329 F.2d 251 (D.C. Cir. 1964)	51
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)	16, 17, 23
Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967)	12, 42
In Re Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	51
Kansas v. Colorado, 185 U.S. 125 (1901)	49, 50
Kansas v. Colorado, 206 U.S. 46 (1906)	24, 29
Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955)	12
Keogh v. Chicago & N.W. R. Co., 260 U.S. 156	31
Land O'Lakes Creameries v. Louisiana, 160 F.Supp. 387 (E.D. La. 1958)	14, 19, 50
Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955)	11

Pages

Loeb v. Eastman Kodak Co., 183 Fed. 704 (3d Cir. 1910) 41
Louisiana v. Texas, 176 U.S. 1 (1900) 14, 20

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 13, 41
Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir. 1956), cert. denied 352 U.S. 890 (1956) 41
Missouri v. Illinois, 180 U.S. 208 (1901) 24, 49
Mormon Church v. United States, 136 U.S. 1 (1890) 23
Mulvey v. Samuel Goldwyn Productions, ... F.2d ..... (9th Cir. Case No. 24157, decided Oct. 20, 1970) 14, 39, 42

New Hampshire v. Louisiana; New York v. Louisiana, 108 U.S. 76 (1883) 14, 20
New York v. New Jersey, 256 U.S. 296 (1921) 49
North Dakota v. Minnesota, 263 U.S. 365 (1923) 14, 20

Oklahoma v. A.T. & S.F. Ry., 220 U.S. 277 (1944) 20, 22, 30
Oklahoma v. Cook, 304 U.S. 387 (1937) 14, 19

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 23, 24, 27, 29
Perkins v. Standard Oil of California, 395 U.S. 642 (1969) 40, 47
Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 11, 42
Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955) 41

Radiant Burners v. People's Gas & Light Co., 364 U.S. 656 (1961) 14, 47
Radovich v. National Football League, 352 U.S. 445 (1957) 13, 41, 42, 47

SCM Corp. v. Radio Corporation of America, 276 F.Supp. 373 (S.D. N.Y. 1967), aff'd 407 F.2d 166 (2d Cir. 1969) 11
South Carolina Council of Milk Producers v. Newton, 360 F.2d 414 (4th Cir. 1966) 39, 40, 42
South Dakota v. North Carolina, 192 U.S. 286 (1904) 21, 24
State of Hawaii v. Standard Oil Company of California, et al., 301 F.Supp. 982 (D. Hawaii 1969) 2
State of Hawaii v. Standard Oil Company of California, et al., ... F.2d ..... (9th Cir., Sept. 25, 1970) 3

Pages

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 39, 45

Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964), cert. denied 379 U.S. 880 (1964) ... 12, 42

United States v. Borden Co., 347 U.S. 514 (1954) 33

United States v. South-Eastern Underwriters Ass'n, 332 U.S. 533 (1948) 13

V.T.R. v. Goodyear Tire & Rubber Co., 303 F.Supp. 773 (S.D. N.Y. 1969) 14

Waldron v. British Petroleum Co., 231 Fed. 72 (S.D. N.Y. 1964) 14, 39, 40

Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966) 45

Wisconsin v. F.P.C., 373 U.S. 294 (1963) 51

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 33, 34, 45

Constitutions

United States Constitution:

Article III 20

Eleventh Amendment 20

Rules

Federal Rules of Civil Procedure, Rule 23 8

Statutes

Clayton Act:

Section 4 (15 U.S.C. Sec. 15) ..... passim

Sherman Act:

Section 1 (15 U.S.C. Sec. 1) 5, 6

Section 2 (15 U.S.C. Sec. 2) 6

15 U.S.C. Section 26 ..... 2, 6, 32, 33

28 U.S.C.: Pages
Section 1254(1) 3
Section 1292(b) 2
Section 1337 2

Texts

C. L. Allen, The Framework of Price Theory, (1967) p. 212 38

64 Colum. L. Rev. 570 (1964) 13, 40, 42

Comparative Living Costs Table, U.S. Dept. of Labor Bulletin No. 1570-1, p. 12, Autumn 1966 39

Malina and Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 65 N.W. L. Rev. 193 (1970) 23

Rowley, Proof of Damages in Antitrust Cases, 32 A.B.A. Antitrust L.J. 75 (1966) 46

Samuelson, Economics, an Introductory Analysis, 265-267 (1951) 38

Toward a Theory of Property Rights, 57 American Econ. Review (1967) 38

Wade and Kamenshine, Restitution for Defrauded Consumers, 37 Geo. Wash. L. Rev., 1031, 1048-49 (1969) 23, 38, 48

23 Vanderbilt L. Rev. 405, 411 (1970) 23, 38, 48, 49

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No.

STATE OF HAWAII,
Petitioner,
vs.
STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner State of Hawaii prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case (Court of Appeals No. 24,603) on September 25, 1970.

OPINIONS OF THE COURT BELOW

This is a civil action for injunctive relief and damages initiated by petitioner, the State of Hawaii against respondents Standard Oil Company of California, Union Oil Company of California, Shell Oil Company and Chevron Asphalt Company. The action was filed in the United States District Court for the District of Hawaii which possessed jurisdiction under 28 U.S.C. §1337 and 15 U.S.C. §§15, 26. In the District Court, plaintiff-petitioner sought injunctive relief and damages as against respondents who were alleged to have combined and conspired to fix the prices of motor gasoline, other refined petroleum products and asphalt. The State of Hawaii sought relief for injuries it suffered in its proprietary capacity (Count One), and as *parens patriae* for injuries to the State and its economy (Count Two), and also through a class action as trustee or representative of its consumers who suffered individual injury (Count Three).

Upon respondents' motion to dismiss Counts Two and Three of the complaint, the District Court sustained the right of the State to maintain its action for damages and injunctive relief as *parens patriae,* but dismissed Count Three, the class action. That decision is reported as follows: *State of Hawaii v. Standard Oil Company of California, et al.,* 301 F.Supp. 982 (D. Hawaii 1969). That decision and opinion is set forth in Appendix I to this petition, *infra.*

Respondents, pursuant to 28 U.S.C. §1292(b) appealed from the order denying their motion to dismiss Count Two. On September 25, 1970, the United States Court of Appeals for the Ninth Circuit reversed the ruling of the

District Court and remanded the case ". . . with instructions that Count Two of Hawaii's amended complaint be dismissed." *State of Hawaii v. Standard Oil of California, et al.*, ... F.2d ..... (9th Cir. September 25, 1970). That opinion is, as yet, unreported; a copy of the decision and opinion is set forth in Appendix II to this petition, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 25, 1970 (See Appendix II). No rehearing or extension of time was either sought or granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The overriding issue here involved relates to the right of the State of Hawaii to utilize the remedies provided by the federal antitrust laws in maintaining an action as *parens patriae* for injuries to the State and its economy as a result of a widespread, pervasive price-fixing conspiracy perpetrated by various major oil companies and directed against the captive market of the State of Hawaii, its economy and its consumer citizens. At stake is the continuing viability of this Court's decision in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), as a basis for the effective enforcement of the antitrust policy of the United States through civil actions initiated by the states under circumstances in which

actions by private consumers are not realistically feasible or practical.

Specifically the questions presented for review by this Court are:

I. Whether a state, as *parens patriae,* may enforce the civil sanctions of the antitrust laws and maintain an action for damages and injunctive relief against major oil companies which have combined and conspired to fix inflated prices *in that state* injuring the economy and general welfare of the state and adversely affecting a substantial portion of the citizenry who are without an otherwise effective remedy?

II. Whether the Court of Appeals erred in ruling that the State of Hawaii, as *parens patriae,* does not have standing to maintain an action under Section 4 of the Clayton Act (15 U.S.C. §15)?

III. Whether the Court of Appeals erred in its failure to recognize that, under *Georgia v. Pennsylvania Railroad Co., supra,* a comprehensive and pervasive price-fixing conspiracy such as alleged herein directed against the markets and consumers within the State of Hawaii could cause substantial injury to the economy and well-being of the State itself and that such injuries are not so indirect as to preclude petitioner's standing to maintain the present action?

IV. Whether, in light of numerous cases such as *Bigelow v. R.K.O. Radio Pictures, Inc.,* 327 U.S. 251 (1946), the Court of Appeals erred in its remand for summary dismissal of the *parens patriae* claim which thereby precluded plaintiff from presenting relevant eco-

nomic data from which the jury could have reasonably estimated the extent of the economic injury and damages suffered as a result of the respondents' illegal and profitable price-fixing scheme?

V. Whether in its remand of the cause for summary dismissal, the Court of Appeals erred in failing to permit petitioner, in its effort to enforce the policies of the antitrust laws and prevent the unjust enrichment by the respondent-wrongdoers, to maintain the present action as *parens patriae* for recovery of damages suffered by citizens and residents of the State who are unable to seek recovery for themselves especially in a case such as this one where the alleged wrong has also injured the economy and well-being of the State?

STATUTES INVOLVED

1. The Clayton Act, Section 4 (15 U.S.C. §15) provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. The Sherman Act, Section 1 (15 U.S.C. §1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

3. The Sherman Act, Section 2 (15 U.S.C. §2) provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT

This is a civil antitrust action for treble damages and injunctive relief initiated by the petitioner, State of Hawaii against the respondents, Standard Oil Company of California (hereinafter "Standard"), Union Oil Company of California (hereinafter "Union"), Shell Oil Company (hereinafter "Shell") and Chevron Asphalt Company (hereinafter "Chevron"), pursuant to sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26). Count One of the fourth amended complaint, alleges that the respondents combined and conspired to fix and maintain unreasonably high prices for motor gasoline, asphalt and other refined petroleum products and, further, that they monopolized trade and commerce in such products in violation of the Sherman Act, Sections 1 and 2, 15 U.S.C. §§1, 2 (R. 46-50). In this respect, the State alleges that—as a purchaser of gasoline, asphalt and such other products through its departments, institutions and agencies—it was compelled to pay higher prices for these products than it would have paid in a free and competitive market. Petitioner alleges

that appellants' unlawful combination thus resulted in economic injury to the State in its proprietary capacity. (R. 50).

Count Two of the amended complaint re-alleges the conspiracy by and between Standard, Union, Shell and Chevron and additionally alleges (R. 50-51):

> "19. The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws, hereinbefore alleged.
>
> 20. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization, hereinbefore alleged, have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:
>
> (a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;[1]
>
> (b) taxes affecting the citizens and commercial entities have been increased to affect[2] such losses of revenues and income;
>
> (c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
>
> (d) the full and complete utilization of the natural wealth of the State has been prevented;

---

[1]This should be read as follows: "revenues of its citizens have been wrongfully extracted from the *economy* of the State of Hawaii."

[2]This is a typographical error. The word "affect" should be "offset".

(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

(g) the Hawaii economy has been held in a state of arrested development.

21. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

In Count Two, then, the State of Hawaii asserts a claim as *parens patriae* to protect the economy of the State and the general welfare of its citizenry. In Count Two the State seeks damages pursuant to Section 4 of the Clayton Act (15 U.S.C. §15), in order to recover for the economic harm which the respondents have already caused by their alleged price-fixing conspiracy. Moreover, injunctive relief is sought to prevent the continuation of the alleged economically deleterious price fixing conspiracy in the future. (R. 52-53.)

In a third count of the amended complaint, the State of Hawaii re-alleged the conspiracy and sought recovery pursuant to Rule 23 (Fed. R. Civ. Proc.) as representative of a class comprised of all purchasers (in the State) of respondents' gasoline, asphalt and/or other refined petroleum products (R. 51-53).

Respondents moved to dismiss Counts Two and Three. They argued that an action by the State as *parens patriae*

would not lie to recover damages under the antitrust laws for an injury to its economy (R. 56-57). Moreover, as to Count Three, respondents challenged the class action as unmanageable. They argued that because the class involved (consumers of petroleum products) would be so large and diverse the Court should not allow the utilization of the class action remedy (R. 38, 39).

The District Court apparently agreed with respondents as to the impropriety of a class action and granted the motion to dismiss Count Three of the amended complaint. (R. 68).

However, the District Court denied respondents' motion to dismiss Count Two of the complaint, recognizing that (R. 62)

> "... if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity."

The District Court's decision upholding Count Two was based on an historical and analytical application of the *parens patriae* doctrine. The Court recognized that the *parens patriae* remedy is available to the State where (a) a "substantial portion of the inhabitants are adversely affected" by the allegedly wrongful acts challenged in the action (R. 61); and (b) the deleterious impact upon the general welfare of the State and its economy are separate from the economic injuries suffered by individual citizens (R. 62, 64).

Thus, the District Court sustained the State of Hawaii's *parens patriae* claim because the respondents' alleged conspiracy was so widespread as to injuriously affect

hundreds of thousands of citizens of Hawaii and thus raise a justiciable issue with respect to the alleged impact on the State's economy (R. 62). By dismissing the class action (Count Three), it may be reasonably inferred that the Court recognized that each of these citizens had no practical or effective individual remedy in their own right (which is the historical justification for the *parens patriae* remedy). Moreover, by focusing on the allegations made in paragraph 20 of the complaint (R. 51), the Court recognized that the State of Hawaii is here seeking to recover for an injury caused to *its economy* and not for the economic losses of the individual consumers. (R. 64, 65).

In light of these considerations and additional considerations such as the size and pervasiveness of the oil industry, the impact of its products upon our society, the nature of the price-fixing conspiracy alleged herein, and the effect of that conspiracy upon hundreds of thousands of small-volume consumers the District Court found that the *parens patriae* remedy was proper *in the present case*. Contrary to the fears expressed by respondents in the Court of Appeals, then, a decision sustaining Count Two herein may have some precedential relevance in a limited number of other industries, but it would not permit the *parens patriae* action to ". . . become a commonplace remedy for recovery of damages under the antitrust laws." (Opening Brief, p. 6.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS SERIOUSLY WEAKENS THE EFFECTIVENESS OF THE PRIVATE ACTION PURSUANT TO SECTION 4 OF THE CLAYTON ACT AS A VITAL MEANS FOR ENFORCING THE ANTITRUST POLICY OF THE UNITED STATES.

By its decision and opinion in the present case, the Court of Appeals for the Ninth Circuit has emasculated this Court's ruling in *Georgia v. Pennsylvania Railroad Co., supra*. But equally as significant, the Ninth Circuit's decision has further contributed to the erosion of the civil antitrust remedies provided by Congress as a significant component in the vigilant enforcement of national antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947). In its *Perma-Life Mufflers* ruling, this Court condemned judicially created restrictions which ". . . threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." 392 U.S. at p. 136.

It cannot be denied that there exists great confusion and significant inconsistencies among the Circuits (and often within a Circuit itself) concerning the standing of plaintiffs in civil antitrust actions initiated under Section 4 of the Clayton Act. Often the confusion is generated by the overly conceptual, rather than analytical, approach to defining the "area of the economy endangered" by the antitrust violation (or so-called "target area"). See, for example, *SCM Corp. v. Radio Corporation of America*, 276 F. Supp. 373 (S.D. N.Y. 1967) *aff'd* 407 F. 2d 166 (2nd Cir., 1969); *Fields Productions, Inc. v. United Artists*

Corp., ____ F. 2d ____ (2nd Cir., Sept. 8, 1970); Compare: *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955); *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F. 2d 190 (9th Cir. 1964) *cert. denied*, 379 U.S. 880 (1964).

Many courts have erroneously focused upon the question of whether the injuries to the plaintiff were "direct" or "indirect". *Conference of Studio Unions v. Loew's Inc.*, 193 F. 2d 51 (9th Cir. 1951), *cert. denied* 342 U.S. 919 (1952); Compare: *Hoopes v. Union Oil Co.*, 374 F. 2d 480 (9th Cir. 1967).

Most recently, courts have emasculated the civil antitrust remedy by restrictive interpretations of the type of economic and proprietary interests which are protected by Section 4. See *V.T.R. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773 (S.D. N.Y. 1969); Compare: *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D. N.Y. 1964); *Mulvey v. Samuel Goldwyn Productions*, ____ F. 2d ____ 9th Cir. Case No. 24157, decided October 20, 1970).

The decision of the Court of Appeals in our present case not only reflects the judicially created chaos surrounding the question of standing under Section 4, it proceeds to compound that confusion and further obfuscate standing considerations by restrictively construing the words "business" and "property" in such a way as to limit the availability of this civil antitrust remedy and thereby weaken the effectiveness of the treble-damage action as a means for enforcing national antitrust policy.

The State of Hawaii's petition for a writ of certiorari should be granted in the present case in order to provide

this Court with an opportunity to settle the confusion and inconsistencies which have proliferated in the lower federal courts. This Court, then, must forcefully re-articulate the position which it has consistently followed of liberalizing the availability of the civil treble-damage remedy. Note, *Standing To Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L. Rev. 570 (1964).

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) this Court stated, concerning Section 4:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors or to sellers. Nor, does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; *American Tobacco Co. v. United States*, 328 U.S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." [Citing *United States v. South-Eastern Underwriters Ass'n.*, 332 U.S. 533, 553 (1948).

In *Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957), the Court appeared to be specifically chastising those lower courts which had restrictively limited the standing of treble damage plaintiffs:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Publishing Co. v. United States*, 1953, 345 U.S. 594, 614, *and meet the requirement that petitioner has thereby suffered injury*. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the

> public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

Again in 1961, the Court stated, regarding a plaintiff's right to maintain an action under Section 4 of the Clayton Act:

> "[To] state a claim upon which relief can be granted under that section, allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all the law requires.
>
> *Radiant Burners v. People's Gas & Light Co.*, 364 U.S. 656, 660 (1961).

II. THE STATE OF HAWAII SHOULD BE PERMITTED TO MAINTAIN THIS CIVIL ANTITRUST ACTION FOR DAMAGES AND INJUNCTIVE RELIEF IN ITS CAPACITY AS PARENS PATRIAE.

A. The Necessity of the Parens Patriae Remedy in the Present Case.

Respondents, in their historical discussion of the *parens patriae* doctrine and the original jurisdiction cases in the Court below, mistakenly characterize the present action. The numerous cases cited by respondents, including *Oklahoma v. Cook*, 304 U.S. 387 (1937); *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Louisiana v. Texas*, 176 U.S. 1 (1900); *New Hampshire v. Louisiana; New York v. Louisiana*, 108 U.S. 76 (1883) and the more recent *Land O'Lakes Creameries v. Louisiana*, 160 F. Supp. 387 (E.D. La. 1958), all rule merely that a state may neither sue as

parens patriae nor initiate an original action in the Supreme Court if the state is attempting to enforce the rights of a small and well-defined group of private citizens. Petitioner can accept the logic of these cases. However, the allegations of the complaint herein demonstrate why ours is not such a case. The State of Hawaii does not here seek to vindicate the private claims of its citizen-consumers. The individual injuries to these citizens were sought to be remedied through Count Three of the amended complaint in a class action in their behalf. However, the District Court dismissed the class action, at the urging of respondents that the class would be so large and diverse as to make adjudication of the individual claims of each consumer impossible. (R. 68).

Thus, the hundreds of thousands of injured citizens who were consumers of respondents' refined petroleum products in Hawaii are unable to join in a class action. Individually their injuries are so small that realistically—and historically—it cannot be contemplated that their claims will ever be brought. Thus, if the decision of the Court of Appeals is allowed to stand, respondents will be permitted to retain the bulk of the revenue which they unlawfully extracted from the consuming public in the State of Hawaii.

Standard, Union, Shell and Chevron did (we must here assume) enter into a conspiracy to establish and impose artificially inflated prices for gasoline and other petroleum products in the Hawaii market and these respondents illegally derived substantial amounts of money as a result of their monopolistic conduct. Is their wrong to go unremedied? Will the wrongdoers be permitted to profit from their illegality?

Our legal system must not and does not tolerate such unjust enrichment. A widespread anti-competitive discriminatory price-fixing conspiracy which, in its pervasiveness, victimizes millions of citizen-consumers in a particular state may cause a significant injury to the economy of the state itself. Such injury, if found to exist, may be remedied through an action brought by the state in its capacity as *parens patriae. Georgia v. Pennsylvania Ry. Co., supra.*

The crucial problem which this Court must confront is that if the Court of Appeals decision stands, in a case such as ours, antitrust conspirators who fix prices on consumer products (if the impact of the anti-competitive practice is sufficiently pervasive) will be able to retain their illegal profits. Government fines are but a miniscule fraction of the conspirators' illicit gains, and class actions are impractical because of the size of the prospective class and the relatively small financial loss of each class member. Indeed, the decision of the Court of Appeals, if not reversed, would ironically encourage would-be antitrust violators to spread the anti-competitive effect of their illegal price-fixing over as large a portion of the consumer population as possible. The more comprehensive the illegal program, the better chance of avoiding any meaningful private treble-damage action.

This Court has recognized this dilemma in another context. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court rejected the application of the pass-on defense against shoe buyers, observing:

> "*These ultimate consumers,* in today's case the buyers of single pairs of shoes, *would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust trust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them.* Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. at 494. (Emphasis added.)

Our case presents a situation more critical and urgent than that in *Hanover Shoe.* For here, as in *Hanover Shoe,* the hundreds of thousands of injured consumers have no practical antitrust remedy, but in addition, there exists in our case no "middlemen" who can effectively prevent respondents from retaining "the fruits of their illegality."

The State of Hawaii has alleged that the subject matter of respondents' conspiracy concerns the prices charged for products in the Hawaiian market and that in Hawaii such prices are maintained at a discriminatorily high level as compared to prices for the same products in other United States' market areas. From the complaint petitioner's contention is clear: that pursuant to this anti-competitive conspiracy, the respondents have predatorily preyed upon the numerous petroleum product consumers in Hawaii and have thereby caused substantial injury to the economy of the State.

This Court, then, must follow the dictates of its decision in *Georgia v. Pennsylvania Ry. Co.,* 324 U.S. 439, 445 (1945) where it was stated:

> ". . . we construe the allegation . . . as a charge that defendants have conspired to fix rates so as to discriminate against Georgia."

In our case, as in the *Georgia* decision, respondents are alleged to be guilty of combining to fix prices *in Hawaii*. As such they have discriminated against Hawaii *as a state*. It is not necessary for the maintenance of this *parens patriae* claim to allege or prove that the respondents, in establishing discriminatorily high prices in Hawaii, acted with malice or ill-will against the State or its consumers. For regardless of their intention, the impact of the alleged price-fixing conspiracy is equally injurious to the Hawaii economy. As the complaint alleges, in part: revenues have been unjustifiably extracted from the State's economy; opportunities in manufacturing, shipping and commerce have been restricted and curtailed; the high cost of manufacturing in Hawaii has precluded its products from equal competitive access to the national market as compared with those of other states; and the Hawaii economy has been held in a state of arrested development (R. 51).

Contrary to respondents' argument in the Courts below, then, this case *does* involve a conspiracy to discriminate against the State of Hawaii and its citizens. And, as a consequence of that conspiracy, the State of Hawaii suffered an injury to its economy. Under *Georgia v. Pennsylvania R. Co., supra,* the antitrust claim asserted by the State of Hawaii as *parens patriae* is properly alleged.

B. Georgia v. Pennsylvania Ry. Co. Establishes the Right of the State of Hawaii, as Parens Patriae, to Maintain an Anti-trust Action as Alleged in Count Two of the Amended Complaint.

Respondents, in their briefs below, devoted extensive verbiage to an historical study of the *parens patriae* action and its original function of permitting a sovereign to bring an action on behalf of legally incompetent citizens. Petitioner submits that this historical analysis, while interesting, is essentially irrelevant to the current action. It is clear under modern law that the state has the right to bring suit as *parens patriae* on behalf of all, or even a substantial portion of its citizens, whether or not they are legally competent. *Georgia v. Pennsylvania Ry. Co., supra; Land O'Lakes Creameries v. Louisiana,* 160 F.Supp. 387, 389 (E.D. La. 1958).

Respondents then attempted to characterize this action as one in which the State of Hawaii is attempting to vindicate the essentially private claims of its citizen-consumers. For example, in the Courts below, respondents cited *Oklahoma v. Cook,* 304 U.S. 387 (1937). In that case, the Court merely ruled that the State may not avail itself of original jurisdiction in the Supreme Court when it is acting for a small group of private parties (depositors and creditors of a bank) rather than in the state's interest as a sovereign. The rule of the *Cook* case, then, was that original jurisdiction in the United States Supreme Court is improper in a case where the Court determined that the state's request for relief was "sought solely for the benefit of depositors and creditors of the bank." 304 U.S. at 395.

The same issue relating to the state's pressing of claims on behalf of a well-defined group of private individuals was also involved in other cases cited below by respondents. *New Hampshire v. Louisiana; New York v. Louisiana*, 108 U.S. 76 (1883); *Louisiana v. Texas*, 176 U.S. 1 (1900); *North Dakota v. Minnesota*, 263 U.S. 365 (1923). In most of these related cases the state was asserting essentially private claims of a particular (and often very small) segment of its population. The state had assumed the role of plaintiff in order to invoke the original jurisdiction of the Supreme Court and/or to circumvent the Eleventh Amendment which would have precluded federal jurisdiction in an action by the private citizens (who were the real parties in interest) against another state. Thus, the Court was concerned lest the constitutional limitations of Article III and the Eleventh Amendment would be circumvented by permitting the state to bring an action on behalf of a small well-defined group of private injured parties.

And in *Oklahoma v. A.T.& S.F. Ry.*, 220 U.S. 277 (1944) (also relied upon heavily by respondents below) the *parens patriae* issue was not even mentioned by this Court. That case involved primarily questions of the Court's original jurisdiction and the Eleventh Amendment neither of which are relevant here. Subsequently, the Supreme Court had occasion to characterize the *Oklahoma* case as "... a suit brought in the name of the state [but] in reality for the benefit of particular individuals" (324 U.S. at p. 446).

Of more relevance is another line of cases in which it was clear that the state, suing as *parens patriae* was pur-

suing its own interest or the *interest of a substantial portion of its citizens at large.* Thus, the propriety of the *parens patriae* suit was recognized and the state was accorded standing. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230; *South Dakota v. North Carolina*, 192 U.S. 286 (1904); *Georgia v. Pennsylvania Ry. Co., supra.* For clear guidance in determining the State of Hawaii's standing under Count Two in the present action, this Court must look to its most recent, most relevant, and most authoritative decision—*Georgia v. Pennsylvania Ry. Co., supra.*

The ruling of that case was that the state, as *parens patriae,* may maintain an action to remedy a violation of the antitrust laws, specifically with respect to violations of the Sherman Act. The Court recognized that a widespread, anti-competitive conspiracy in a major industry which results in imposition of an inflated and discriminatory pricing structure on the economy of the state constitutes a *serious public wrong.* The discriminatory pricing scheme alleged in the present case permits the respondents to inflate their prices for all refined petroleum products (which in today's society are "necessities") at the expense of the economy of Hawaii and its citizen-consumers. The Court in *Georgia v. Pennsylvania Ry. Co.*, said that when such discriminatory pricing policies are directed at the citizens and consumers of a particular state they:

> ". . . may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a state as profoundly as the diversion of waters from the rivers. They may stifle, impede,

> or cripple old industries and prevent the establishment of new ones. They may arrest the development of a state or put it at a decided disadvantage in competitive markets. . . . But discriminatory rates fastened on a region have . . . a more permanent and insidious quality. Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister states." 324 U.S. at 450-451.

Whatever implications the *Oklahoma* case and earlier decisions had regarding the *parens patriae* doctrine were completely superseded by *Georgia v. Pennsylvania Ry. Co., supra*. *Georgia* established, beyond question, that a state may maintain an action as *parens patriae* under the antitrust laws to remedy discriminatory rate or price-fixing conspiracies which are directed at that State's economy. Our present case is nearly identical to the situation in *Georgia*. As in *Georgia*, the case at bar *does* allege a conspiracy, the impact of which, discriminates against the State of Hawaii and its citizens and injures the State's economy and prosperity. When a group of private conspirators combine to inflate prices for a necessary service or commodity and direct their discrimination against a substantial number of the consumers in a state, the state suffers an injury and it may—in its own name—seek an appropriate remedy (324 U.S. at p. 447).

Much of the argument in the Courts below concerned the respondents' claim that a *parens patriae* action by the State could result in a double recovery against them. In support of this argument, respondents submitted a law

review article which it must be noted, was authored by two attorneys who are currently active in defending other *parens patriae* antitrust cases. Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 N.W. L.Rev. 193 (1970).

This argument fails to recognize that the *parens patriae* claim here asserted by the State of Hawaii seeks recovery which *it* has sustained in its quasi-sovereign capacity. Compare: *Hanover Shoe, Inc., v. United Shoe Machinery Corp., supra.* Moreover, respondents have ignored the fact that the *parens patriae* remedy by the State ". . . .is classically exercised 'for the prevention of injury to those who cannot protect themselves'," citing *Mormon Church v. United States*, 136 U.S. 1, 57 (1890). It has already been established here that the vast majority of citizen-consumers in Hawaii have no effective or feasible remedy on an individual basis to protect themselves from respondents' price fixing conspiracy. See Wade and Kamenshine, *Restitution for Defrauded Consumers*, 37 Geo. Wash. L. Rev. 1031, 1048-1049 (1969); Note, *Antitrust Remedies*, 23 Vanderbilt L. Rev. 405, 411 (1970).

In nearly every successful *parens patriae* action which has been initiated in the past, it would be possible to identify individual injuries to particular private citizens. Thus, the mere fact that Hawaiian consumers of respondents' petroleum products were individually injured by the price fixing conspiracy does not preclude the State of Hawaii from maintaining an independent action to remedy the *separate injury* to its economy.

In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), the states of Pennsylvania and Ohio were permitted, as

parens patriae, to enjoin West Virginia's interference with the flow of natural gas to the plaintiff states and their citizens. The United States Supreme Court ruled:

> "The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. *This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected.* It is not merely a remote or ethical interest but one which is immediate and recognized by law" (262 U.S. 592) (Emphasis added).

Many of the early *parens patriae* actions were allowed to remedy numerous varieties of nuisances which harmed private citizens in the plaintiff states, including cases involving the diversion of water, water pollution and air pollution. *Kansas v. Colorado*, 206 U.S. 46 (1906); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Georgia v. Tennessee Copper Co., supra.* In all of these cases, the Supreme Court recognized that the interests of the states were separate and apart from the related injury to their individual citizens. *Pennsylvania v. West Virginia, supra.* And in each case the utilization of the *parens patriae* remedy was permitted by the states because it was pursued to redress injuries which affected substantial portions of the citizenry. *South Dakota v. North Carolina, supra.*

Against the historical background of these cases in which the states were allowed to sue for injuries to themselves as well as to substantial portions of their inhabi-

tants, the result reached in *Georgia v. Pennsylvania Ry. Co., supra,* logically and properly followed. In that case, it was alleged that certain railroad carriers had combined and conspired to fix freight rates at an unreasonably high and discriminatory level. It was further charged that this illegal situation caused injury to every shipper of goods within the State of Georgia. The State, as the plaintiff, alleged that it was economically injured in its proprietary capacity as the owner and operator of a railroad and as a large shipper of goods. However, the State of Georgia further contended that it possessed a cause of action "as *parens patriae* acting on behalf of [its] citizens" (324 U.S. at 450).

The Supreme Court agreed with the position advocated by Georgia, noting that the State had alleged that the illegal conspiracy injured its economy. The Court left no doubts as to the right of a State to initiate actions *parens patriae.*

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, *has injured the economy of Georgia.* Those rights are of course based on federal laws. . . .
>
> "And we find no indication that when Congress fashioned those civil remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the antitrust acts"* (342 U.S. at 447) (Emphasis added).

This line of *parens patriae* cases, culminating in *Georgia v. Pennsylvania Ry. Co.*, clearly recognizes that when private wrongdoers pursue illegal activities directed against a substantial portion of the population of a particular State resulting in the systematic economic exploitation of those private individuals or their property, separate, albeit related, injuries are suffered by the individual citizens and the State itself.

In the instant case, the State of Hawaii has alleged that the respondents managed to dominate and control the market for refined petroleum products in Hawaii and used this combined power to overcharge Hawaiian consumers. Under the ruling of *Georgia v. Pennsylvania Ry. Co.*, this conduct was an actionable wrong harmful to the economy of Hawaii, for which the State may seek remedies in this *parens patriae* action which are appropriate to compensate it for the injury suffered, and to enjoin further harm.

In this case, as in the *Georgia* case, the State of Hawaii has alleged direct pecuniary injury which it has suffered in its operation of public agencies and institutions. In this case, as in the *Georgia* case, the State has alleged statewide conspiratorial price discrimination in an essential industry, "a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister states" (324 U.S. at 451).

The ruling of the District Court correctly applied the *Georgia* case as binding and controlling precedent, and recognized that the State of Hawaii's amended complaint properly alleges its case as *parens patriae*. The State is suing in its own right, not derivatively on behalf of pri-

vate citizen-consumers; and the wrong perpetrated by respondents was a widespread one diffused over such a large and substantial portion of the inhabitants that no effective remedy exists on an individual basis.

Accordingly, the judgment of the Court of Appeals, reversing the District Court and remanding the case for dismissal of the *parens patriae* claim is clearly inconsistent with this Court's prior rulings. The State of Hawaii's petition for a writ of certiorari should be granted.

III. REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS IS NECESSARY TO SETTLE THE QUESTION OF THE PROPRIETY OF THE STATE, SUING AS PARENS PATRIAE, TO RECOVER DAMAGES UNDER SECTION 4 OF THE CLAYTON ACT.

Having established the propriety of this *parens patriae* action, under *Georgia v. Pennsylvania Ry. Co., supra,* as a remedy against a statewide, pervasive, price-fixing conspiracy which victimizes the citizen-consumers of the State of Hawaii, it cannot be denied that injunctive relief must be available to prevent the continuation of such an antitrust violation. *Georgia v. Tennessee Copper Co., supra; Pennsylvania v. West Virginia, supra.*

The Court of Appeals below ruled, however, that under no circumstances can the State of Hawaii recover damages in our present case, suggesting that:

(1) that an injury to the economy and well-being of the State is not an injury to "business" or "property" and hence not compensable under the antitrust remedies provided by Congress; and

(2) the State does not have standing, as *parens patriae*, to sue for money damages under Section 4 of the Clayton Act because any injury as such would be so indirect and remote as to be outside the "area of the economy" which was threatened by the respondents' antitrust violation;

(3) an injury to the economy or well-being of the State, if any, would be incapable of computation of money damages and hence not provable in a court of law.

The Court of Appeals neglected to explain what would become of the vast amounts of money that (accepting the allegations of the complaint as true) respondents have illegally extracted from the economy of Hawaii and the citizen consumers of that State. But that consideration aside, the law as construed, developed, and articulated by this Court in defining the nature of *parens patriae* actions and the policy of enforcement of the antitrust laws through civil treble-damage litigation, recognizes the propriety of recovery of money damages as sought by the State of Hawaii in this action.

A. Georgia v. Pennsylvania Ry. Co. Recognizes that All of the Civil Remedies and Sanctions of the Antitrust Laws Are Available to the State in an Action as Parens Patriae.

In *Georgia v. Pennsylvania Ry. Co., supra,* as in our case, the State sought relief from defendants who were engaged in a conspiracy in violation of the Sherman Act. Georgia sued in its proprietary capacity (Third Count); as *parens patriae* in its sovereign capacity for injury to its economy (First Count), and in its quasi-sovereign capacity as agent and protector of its citizens at large

(Second Count); and finally on behalf of shippers in the State who were adversely affected by the conspiracy. In our present case the State of Hawaii likewise sues in its proprietary capacity (Count One); as *parens patriae* in its sovereign and quasi-sovereign capacities for injuries to the economy of the State and the wrongful extraction of revenues from its citizens (Count Two).

As *parens patriae,* Georgia sought "token damages" of *at least* ten million dollars ($10,000,000), for the injuries caused to its economy and citizenry. Similarly, in the present case the State of Hawaii seeks money damages arising out of respondents' price fixing conspiracy which adversely affected the economy of the State and wrongfully extracted revenues from its consumers.

In *Georgia,* the Supreme Court ruled that an illegal conspiracy which operates to discriminatorily inflate prices for an essential service or commodity within a state is a wrong which harms the economy of that State. Thus, under *Georgia v. Pennsylvania Railroad,* such a wrong is "a matter of grave public interest in which the State, as the representative of the public, has a concern apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law" (324 U.S. at 451); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). And as the Court ruled in *Kansas v. Colorado,* 206 U.S. 46, 99, the State of Hawaii:

> ". . . is not acting directly and solely for the benefit of any individual citizen to protect his [private] rights. Beyond its property rights it has an interest as a state. . . . Its prosperity rises, therefore, above a mere question of local, private right and involves

a matter of state interest, and must be considered from that standpoint."

In short, Hawaii's right as *parens patriae* to bring this action exists as "an interest independent of and behind the titles of its citizens." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *Georgia v. Pennsylvania Railroad, supra.*

Again turning to the controlling language of *Georgia v. Pennsylvania Railroad* (324 U.S. at 447), it is clear that in a *parens patriae* action the State of Hawaii is entitled in the present civil litigation to avail itself of all the remedies of the federal antitrust laws, including the right to collect damages for the injuries which it has suffered:

"But when it came to other *sanctions,* Congress followed a different course and authorized civil *suits* not only by the United States, but by other persons as well. And we find no indication that when Congress fashioned those civil *remedies,* it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae,* have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the antitrust acts" (324 U.S. at 447). (Emphasis added.)

In distinguishing *Oklahoma v. A.T.& S.F.R. Co., supra,* the Supreme Court went on to rule:

"This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the *gravamen of which runs far beyond the claim of damage to individual shippers.*

> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor *meets the standards of justiciability* and since *Georgia is a 'person' entitled to enforce the civil sanctions* of the antitrust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail." (324 U.S. at 452.) (Emphasis added.)

Notice that in the above quotations from the most relevant and authoritative decision applicable to our present case, this Court recognized that a *parens patriae* action (such as petitioner's herein) may be used to pursue "civil *remedies*" under the federal "antitrust *acts*" and as such it is an appropriate vehicle "to enforce the civil *sanctions* of the anti-trust *laws*." The use of the plural form in all of these words cannot be regarded as coincidental, especially in light of the substantial request for damages of at least ten million dollars which Georgia made as *parens patriae*. Rather they indicate that the full spectrum of civil antitrust remedies, including damages, is available in a *parens patriae* suit. There is nothing in the Court's language that would negate the propriety of damages in the present case.

In the *Georgia* case, the state did seek damages in its proprietary capacity and as *parens patriae*. The Supreme Court denied the State's request for damages, not because the suit was *parens patriae*, but solely because the suit involved the railroad and shipping industry where Congress had prohibited rebates. *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156. As the Supreme Court stated in *Georgia* (324 U.S. at 453):

> "If a shipper could recover under Section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate operate to give him a preference over his trade competitors."

Thus, this Court was of the view that if the State of Georgia was permitted to recover any money damages whatsoever arising out of the illegal over-charge—irrespective of the capacity in which it was suing or the Count under which the recovery was obtained—such damages would effectively operate as a preferential rebate in violation of the Congressionally established I.C.C. transportation policy. It is significant, in light of the substantial prayer for damages by Georgia as *parens patriae*, that this Court did not rule, nor did it even suggest, that money damages could not be recovered merely because of the *parens patriae* nature of the claim.

The Court of Appeals below, however, seized upon the superficial fact that no damages were awarded to Georgia and, rather than analyzing the reasons for denial of damages, erroneously concluded that damages may never be recovered by a state as *parens patriae* under Section 4 of the Clayton Act. The Court of Appeals recognized the right of a state as *parens patriae* to seek injunctive relief under Section 16 of the Clayton Act (15 U.S.C. §26) and ruled that *Georgia v. Pennsylvania Ry. Co.* authorized nothing more.

In so ruling, the Court of Appeals ignored the historically recognized parellelism between the purposes underlying and the interests protected by both Sections 4 and

16 of the Clayton Act. Section 16 permits a party in a civil action to obtain injunctive relief only if that party can demonstrate ". . . a threatened loss or damage . . ." to economic interests which are personal to the plaintiff. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954). As this Court stated in the *Borden* case:

> "Under Section 16 of the Act, 15 U.S.C. §26, a private plaintiff may obtain injunctive relief against such violations only on a showing of "threatened loss or damage"; and this must be of a sort personal to the plaintiff, *Beegle v. Thomson*, 7 Cir. 1943, 138 F.2d 875, 881. *The private-injunction action, like the treble-damage action under §4 of the Act*, supplements Government enforcement of the antitrust laws. . . ." 347 U.S. at p. 518. (Emphasis added.)

Thus, only if an antitrust plaintiff suffers an injury or is threatened with an injury to his economic or property interests is he allowed to seek relief through damages or injunction. It is, therefore, inconsistent to hold, as the Court of Appeals suggests, that the injury to the State of Hawaii was of sufficient economic or proprietary impact to confer standing on it as *parens patriae* to seek injunctive relief under Section 16, but not damages under Section 4. As this Court has most recently observed in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) the only difference between the injunctive and treble-damage remedies is that the latter requires proof of past injury whereas the former requires proof of "threatened" injury. 395 U.S. at p. 130. Moreover, in making it clear that both civil remedies seek to vindicate the same private interests and public policies, the Court observed in *Zenith* that:

"We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by §16, should not respond to the 'salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.' *NLRB v. Express Publishing Co., supra,* 312 U.S. at 436. Although a district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violation found by the court, e.g. *New York, N.H. & H.R. Co. v. ICC,* 200 U.S. 361, 401 (1906), '[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.' *International Salt Co. v. United States,* 332 U.S. 392, 400, 68 S. Ct. 12, 17, 92 L.Ed. 20 (1947). *This is particularly true in treble-damage cases,* which are brought for private ends, but which also serve the public interest in that 'they effectively pry open to competition a market that has been closed by defendants' illegal restraints.' *Id.,* at 401." 395 U.S. at p. 133. (Emphasis added.)

Under our law, injunctive relief is an equitable remedy which is appropriate only in extraordinary cases. Damages, on the other hand, is a more commonplace remedy and hence more readily available. Yet the Court of Appeals, in a classic example of quoting a sentence out of context, observed that *Georgia v. Pennsylvania Ry. Co.* involved an injunction to deter an illegal combination then cited this Court's language in the case at 324 U.S. at p. 462: "No more is envisaged here."

That statement in the *Georgia* case was made with respect to the propriety of granting an injunction which

would affect future shipping rates, the setting and approval of which is under the jurisdiction of the Interstate Commerce Commission. The words: "No more is envisaged here", do not imply, as the Court of Appeals suggests, that *parens patriae* damage actions are out of the question. Rather, when read in context, this sentence merely indicates that the granting of an injunction restraining defendants from illegally and coercively fixing rates would not interfere with the policies and subsequent official rate regulations of the I.C.C.

> "No more is envisaged here. If the alleged combination is shown to exist, the decree which can be entered will be no idle or futile gesture. It will restore that degree of competition envisaged by Congress when it enacted the Interstate Commerce Act. It will eliminate from rate-making the collusive practices which the anti-trust laws condemn and which are not sanctioned by the Interstate Commerce Act. It will supply an effective remedy without which there can be only an endless effort to rectify the continuous injury inflicted by the unlawful combination." 324 U.S. at p. 462.

This example of the Court of Appeals' confusion reemphasizes the fact that the *Georgia* case must be read as recognizing that the injury suffered by a State as *parens patriae* as a result of a pervasive antitrust conspiracy as alleged herein is a wrong which injures a protectable interest of the State. And this ". . . is not merely a remote or ethical interest, one which is immediate and recognized by law." *Georgia v. Pennsylvania Ry. Co.*, 324 U.S. at p. 451. Since the injury to the State of Hawaii caused by respondents' antitrust violation is recognized by law it is amenable to the civil antitrust remedies pro-

vided by law, including the treble-damage action of Section 4.

Unlike the *Georgia* case, our present action does not involve the transportation industry or any other industry whose rates and prices are set by federal law. Therefore the reasoning in *Georgia* which precluded recovery of damages does not apply in the case now before this Court. And it must be recognized that petitioner herein may utilize all available antitrust remedies—damages as well as injunctive relief to vindicate the injury to its interest ". . . which is immediate and recognized by law." The District Court, then, after a careful reading of the entire *Georgia* opinion properly concluded that the only rational inference to be drawn from that case is that an antitrust claim for damages as *parens patriae* was properly asserted by Georgia there and by Hawaii here. As the lower Court incisively stated:

> "Certainly the broad objectives of the antitrust statutes are not to be meanly or narrowly curtailed because it is a state that brings a damage claim thereunder in a *parens patriae* capacity." (R. 63-64.)

B. The State of Hawaii Has Standing Under Section 4 of the Clayton Act to Maintain this Action for Damages, as Parens Patriae.

The Court of Appeals ruled that petitioner's suit as *parens patriae* was not cognizable under Section 4 because the State of Hawaii was not injured in its "business" or "property". The crucial issue which this Court must resolve is whether an injury to the economy of the State of Hawaii constitutes a well-defined and compensable economic loss. Petitioner submits that this Court has pre-

viously answered that question in the affirmative in *Georgia v. Pennsylvania Ry. Co., supra,* where it ruled:

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, *has injured the economy of Georgia.* Those rights are of course based on federal laws . . .
>
> "And we find no indication that, when Congress fashioned those civil remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the antitrust acts.*" 324 U.S. at p. 447.) (Emphasis added.)

In our case, the District Court properly followed the dictates of *Georgia* and recognized that suits *parens patriae* are included within the purview of *all* civil antitrust remedies. If the economy of a state can be injured by monopolistic activity, sound antitrust enforcement policy demands that civil actions initiated pursuant to Section 4 be available to remedy such injuries. However, the Court of Appeals in open defiance of the *Georgia* ruling, questioned whether the economy of a state could in fact be injured by pervasive antitrust conspiracies such as those involved in *Georgia* and in our present case:

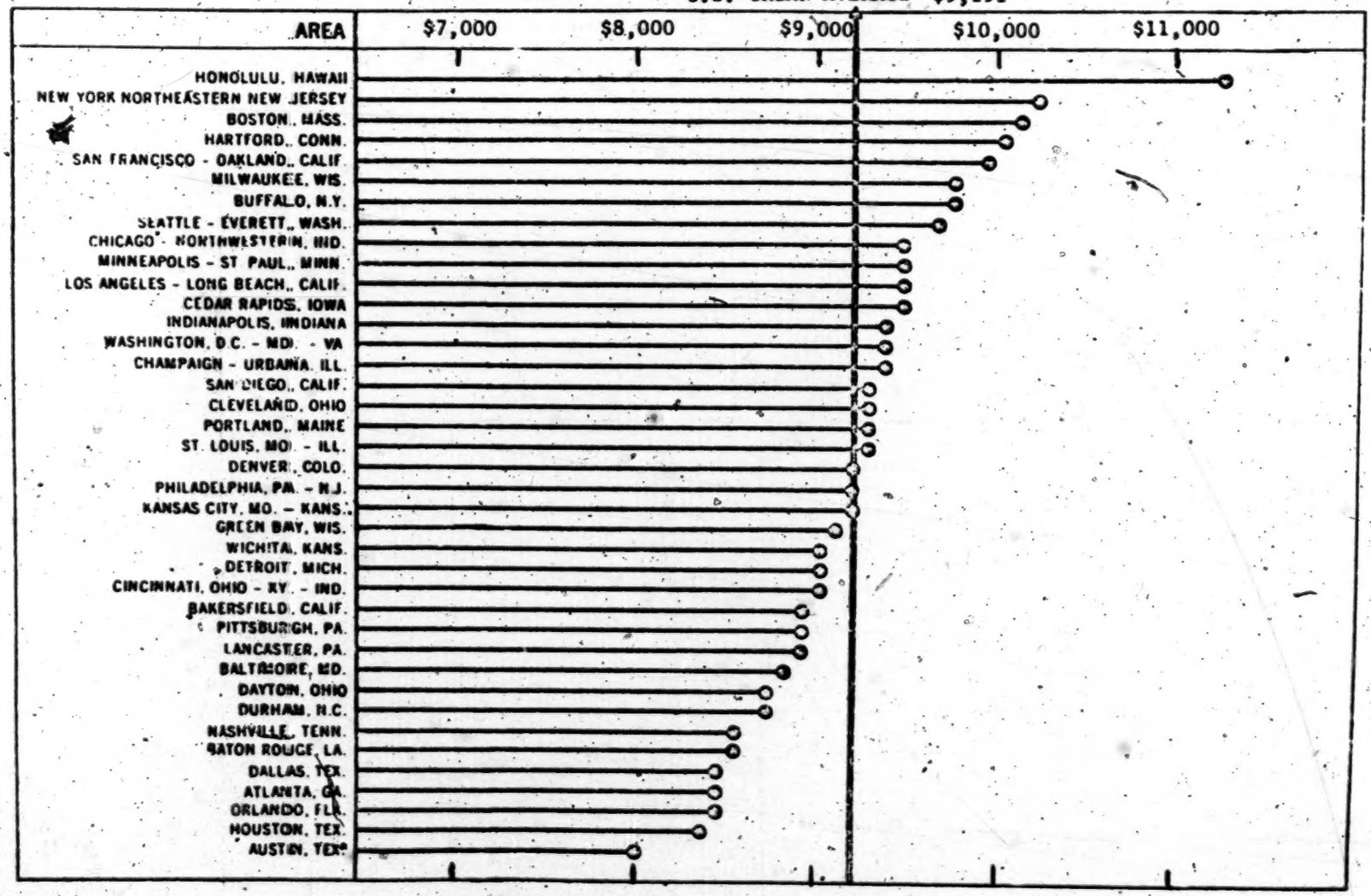
It would seem clear that *Georgia,* and a score of other *parens patriae* decisions of this Court establish as a matter of law that private tortious conduct directed against a state or a substantial portion of the state's population is

an injury to the state itself. Certainly, a pervasive price-fixing conspiracy such as is alleged herein, involves economic wastage and a misallocation of economic resources. Demetz, *Toward a Theory of Property Rights,* 57 American Econ. Review (1967). To the extent that the price-fixing conspiracy of the respondents operates here to "bleed" the economy of the State of Hawaii, it damages and detracts from various private proprietary interests held and limits the development of industrial opportunities—current and anticipated—within the State, and in turn, diminishes the tax base of that State. This is not only an injury to the business and property of the State, but also involves the kind of "economic inefficiency" [C.L. Allen, *The Framework of Price Theory,* p. 212 (1967)] which the antitrust laws are designed to prevent. See also: Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo. Wash. L. Rev. 1031, 1048 (1969). In this age of advanced economic development, a statewide price fix on a widely used consumer commodity has a tremendous impact not only on the direct purchaser, but on the economy of the state as a whole. Samuelson, *Economics, an Introductory Analysis,* 265-267 (1951); Note, *Antitrust Remedies,* 23 Vanderbilt L. Rev. 405, 409-411 (1970). Manufacturing, farming, shipping, any industry requiring transportation by motor vehicle, are inevitably affected by such a price conspiracy. As the District Court so astutely observed (R. 62):

> "The court would judicially notice that there is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other

COMPARATIVE LIVING COSTS
MEASURED BY
THE CITY WORKER'S FAMILY BUDGET
(moderate living standards, autumn 1966)

U.S. URBAN AVERAGE = $9,191



SOURCE: U.S. Department of Labor - Bureau of Labor Statistics
Autumn, 1966 - Bulletin No. 1570-1, p. 12.

petroleum products referred to in the present complaint, and perforce therefore, the cost thereof."

One example of the type of harm which has been caused by price-fixing conspiracies such as that alleged against respondents herein is the artificially inflated price structure for necessary items. Such price-fixing and area price discrimination leads to an overall and disproportionate increase in cost of living for the residents and consumers in the geographical area (here, the State of Hawaii) which is victimized by the conspiracy. (See Comparative Living Costs Table, U.S. Dept. of Labor Bulletin No. 1570-1, p. 12, Autumn, 1966 reprinted opposite).

The Court of Appeals, then, failed to see the nature and extent of the injury to the State of Hawaii. Moreover, it failed to recognize that the word "property" in Section 4 of the Clayton Act includes all economic injuries to a plaintiff which the antitrust laws seek to prohibit. Compare: *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir. 1966); *Mulvey v. Samuel Goldwyn Productions, supra; Waldron v. British Petroleum Co.*, 231 F.72 (S.D.N.Y. 1964).

In defining the type of "property" interests protected under Section 4 of the Clayton Act, the Court in *Waldron, supra* stated:

> "The statute explicitly uses the words 'business or property' in the disjunctive. Congress intended this distinction to be meaningful. The word 'property' has wider scope and is more extensive than the word 'business'. *Less is required to prove 'property' than to prove 'business'.*

> "*The statute does not set up a qualitative or quantitative test to determine the existence of 'property'.* Nor does the statute contain a built-in definition.
>
> "The word 'property' is, in a sense, a conclusory term, i.e., *an interest which the law protects.* A determination whether plaintiff has 'property' involves a *value judgment as to whether that which plaintiff factually possesses should be legally protected.* If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses 'property' ". 231 F.Supp. at 86. (Emphasis added.)

This Court, in *Georgia v. Pennsylvania Ry. Co., supra,* has already made the "value judgment" that an injury to the economy and well-being of the state in its *parens patriae* capacity is the type of "property" protected by the antitrust laws. Therefore, the injury caused by respondents herein to that property interest of the State of Hawaii may be remedied by a damage action pursuant to Section 4. Inasmuch as petitioner has shown that it is within the class of persons entitled to the protection of the antitrust laws, and that the injury caused is the type that the antitrust laws seek to prevent, both national policy and the law as articulated by this Court demand that petitioner be accorded the right to maintain and pursue this present action. See, for example, *South Carolina Council of Milk Producers v. Newton, supra,* 360 F.2d at pages 418-419, citing 64 Colum. L. Rev. 570, 585, (1964). See also: *Perkins v. Standard Oil of California,* 395 U.S. 642, 648 (1969); and *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 700-701 (1962).

C. The Court of Appeals Erroneously Ruled that the Injury to the State of Hawaii Was so Incidental, Remote and Indirect as to be Outside the "Target Area" of Respondents' Antitrust Violation.

The Court of Appeals below stated that, even were it to accept the notion of injury to the economy of a State as a result of an antitrust violation such as is alleged here, ". . . such injury is indirect and consequential. . . ." The Court of Appeals went on to state that "It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act", citing many of the so-called "target area" cases such as *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2nd Cir. 1958); *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3rd Cir. 1956); *cert. denied*, 352 U.S. 890 (1956); *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3rd Cir. 1910); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678 (2nd Cir. 1955). These decisions and others indicate that when an antitrust violation is "aimed at" a particular class of victims, the shareholders, lessors, creditors and others who are "outside that area of the economy endangered" by the violation have no standing to maintain an action under Section 4 even though they suffered injury.

Initially, the Court below failed to recognize that this "target area" concept is a somewhat artificial limitation upon an antitrust plaintiff's standing to sue and one which runs counter to the national policy in favor of vigorous private enforcement procedures. See the numerous decisions and quotations of this Court set out in the Argument, above: *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., supra; Radovich v. National Football*

League, supra; Perma-Life Mufflers, Inc. v. International Parts Corp., supra; Lawlor v. National Screen Service Corp., supra. This Court has never approved of the "target area" limitation. 64 Colum. L. Rev. 570, 585 (1964).

The Court of Appeals also failed to recognize or even address itself to the more recent and enlightened line of "target area" cases which have established that a plaintiff is within the endangered area of the economy and thus has standing to sue under Section 4 if it could reasonably be foreseen that the plaintiff would be affected by the illegal conduct. *Mulvey v. Samuel Goldwyn Productions, supra; South Carolina Council of Milk Producers v. Newton, supra.* Ironically, it has been the Ninth Circuit itself which has led the way toward the more enlightened view of standing. In *Twentieth Century-Fox Film Corp. v. Goldwyn, supra* the Ninth Circuit Court ruled that:

> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather it was intended to express the view that plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." 328 F.2d at p. 220.

See also: *Hoopes v. Union Oil Co., supra* and *Mulvey v. Samuel Goldwyn Productions, supra.*

In *Georgia v. Pennsylvania Ry. Co., supra,* this Court made it clear that a widespread and pervasive private

antitrust conspiracy aimed at businessmen or consumers within a particular State causes an independent injury to the State itself. In our case, the State of Hawaii and its citizen-consumers of petroleum products were the specific targets of the respondents' anti-competitive conspiratorial conduct. Because of Hawaii's relatively isolated geographical location, the State and its citizens became easy prey for the respondents. The complaint clearly alleges that the illegal price-fixing by respondents directly resulted in a discriminatorily inflated price structure being imposed for petroleum products within the State of Hawaii. Thus, under the *Georgia* case, respondents must be held to have been reasonably able to foresee that their illegal conduct would have adversely affected the Hawaii economy.

Therefore, even if this Court accepts the "target area" limitation on standing, the injury to petitioner here was of the type that could reasonably have been foreseen by respondents to have resulted directly from their illegal conduct.

This Court has recently had occasion, in a different context, to consider the standing of a party to sue under federal statutes. *Association of Data Processing Service Organizations, Inc. v. Camp.*, —— U.S. ——, 90 S. Ct. 827 (1970); *Barlow v. Collins*, —— U.S. ——, 90 S. Ct. 832 (1970). In *Data Processing*, this Court articulated two general standards for determining the propriety of a plaintiff's standing:

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." 90 S. Ct. at p. 829.

"[The second question is] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest, at times, may reflect 'esthetic, conservational, and recreational' as well as economic values. *Scenic Hudson Preservation Conference v. FCC*, 354 F.2d 608, 616; *United Church of Christ v. FCC*, 359 F.2d 994, 1000-1006 . . . We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioner relies here. Certainly he who is 'likely to be financially injured', *Commission v. Sanders Radio Station*, 309 U.S. at 417, may be a reliable private attorney general to litigate the issues of the public interest in the present case." 90 S. Ct. at p. 830.

In stating the requirements for standing in *Data Processing* and *Barlow, supra,* the Court de-emphasized the necessity that the plaintiff actually show a tangible economic interest in himself. Whether plaintiffs can in fact prove injury adequate to support recovery relates to the *merits* of their claim, not to the preliminary question of standing. Such issues are pertinent only to the damage aspects of these cases, and have no relevance to standing to sue. And, when it comes to the issues of damages, this Court has been most specific in demanding that an anti-trust plaintiff be given full opportunity to establish—before the jury—the nature and extent of the economic injury suffered as a result of the illegal anti-competitive conduct charged. *Bigelow v. R.K.O. Radio Pictures, Inc., supra.*

A careful reading of the opinion of the Court of Appeals below demonstrates that the Court had concluded that an injury to the economy of the State was not the kind of injury which could be identified, ascertained or calculated in a legal proceeding. This underlying assumption by the Court below appears to have controlled its ruling that the damages, if any, were too remote, attenuated, and indirect to support petitioner's standing herein.

But *Georgia v. Pennsylvania Ry. Co., supra,* establishes that such an injury to the economy of the State is one which the antitrust laws recognize and prohibit. Moreover, the civil damage action is such an essential and integral part of national antitrust enforcement policy that this Court has recognized that such a suit will not fail merely because the precise amount of damages is difficult to ascertain. Monopolists cannot be allowed to go free and enjoy the profits of their illegal conduct merely because their conspiracy was so effective and pervasive that damages are difficult to measure. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931); *Bigelow v. RKO Radio Pictures, Inc., supra; Zenith Rudio Corp. v. Hazeltine Research, Inc., supra;* see also: *Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc.,* 356 F.2d 371, 379 (9th Cir. 1966). In *Bigelow* the Court stated:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the *jury may make a just and reasonable estimate of the damage based on relevant data* and render its verdict accordingly. In such circumstances 'juries are allowed to act on

> probable and inferential as well as upon direct and positive proof'. . . . *Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.* It would be an inducement to make the wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. The most elementary conceptions of justice and public policy require that the *wrongdoer shall bear the risk of the uncertainty which his own wrong has created.*'' 327 U.S. at pp. 264, 265. (Emphasis added).

One noted antitrust lawyer has put it this way:

> ''Juries, being gifted with the power to put a dollar value on a person's reputation, or his eyesight, or his wife's affections, or even his life itself, should have little trouble with so relatively simple a proposition as measuring in dollars the amount of injury a monopolist . . . or a conspirator has inflicted upon his victim's business or property.'' Rowley, *Proof of Damages in Antitrust Cases,* 32 A.B.A. Antitrust L.J. 75 (1966).

In accord with this spirit, Courts have liberally permitted antitrust plaintiffs to introduce as evidence any ''relevant data'' which would aid the jury in calculating the amount of damages involved. In our present case, the Court of Appeals summarily interdicted this function of the jury and implied that an injury to the economy of the State of Hawaii was, as a matter of law, dubious, and could not, in all likelihood, be proven.

Not only does this analysis by the Court of Appeals run counter to national antitrust policy and the rulings

in *Georgia* and *Bigelow*, it violates the specific theory of standing of antitrust plaintiffs developed and articulated by this Court:

> "Where plaintiff proves a loss, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that *the jury*, as the trier of the facts, *must be permitted to draw from this circumstantial evidence the* inference that the necessary causal relation exists." *Continental Ore Co. v. Union Carbide & Carbon Co., supra,* 370 U.S. at p. 697. (Emphasis added.)

See also, to the same effect: *Perkins v. Standard Oil Co. of Calif., supra; Radiant Burners v. People's Gas & Light Co., supra; Radovich v. National Football League, supra.*

In the final analysis, the national policy in favor of the Section 4 civil damage action supports the maintenance of this action. *Parens patriae* suits may be brought under the antitrust laws. Therefore, the State of Hawaii must be permitted to recover damages from the respondents for the vast amounts of revenue which they have illicitly extracted from the economy of the State. This Court must reject the technical and formalistic arguments which seek to legitimate the unjust enrichment respondents have enjoyed, and which would result in abolishing the important avenue for consumer protection recognized in the *Georgia* case. The *parens patriae* claim here asserted must be permitted to proceed to trial where a jury can consider the relevant economic data (including expert witness testimony) and make a just and reasonable estimate of the damages.

IV. THE PETITIONER, STATE OF HAWAII, SHOULD BE PERMITTED TO MAINTAIN ITS ACTION UNDER SECTION 4 OF THE CLAYTON ACT AS THE REPRESENTATIVE OF THE INTERESTS OF ITS CITIZENS.

Primarily, the position of the petitioner herein, consistent with the theory underlying *Georgia v. Pennsylvania Ry. Co., supra,* is that the respondents' pervasive conspiracy caused an injury to the economy of the State of Hawaii, which injury is separate and independent from the harm caused to the various individual consumers. Under *Georgia,* the injury to the economy must be viewed either as an injury to "property" or as being another form of economic interest which Congress intended to protect through Section 4.

Irrespective of the petitioner's primary theory, there exists an alternative rationale which, when read in the light of the national policy favoring antitrust enforcement through the civil damage action, clearly supports the propriety of the present suit and the standing of the State of Hawaii as *parens patriae.*

Historically, it has been recognized that the State as *parens patriae* may bring civil actions as the *representative* of its citizens and to remedy wrongs committed against a substantial portion of the citizenry. Such certainly reflects the situation in the present case. The hundreds of thousands of consumer-citizens of the State of Hawaii cannot feasibly protect themselves. Their claims, as individuals, are too small to justify litigation. Respondents have already successfully argued that the consumers, as a class, are too large and diverse. Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo. Wash. L. Rev. 1031 (1969); Note, *Antitrust Remedies,*

23 Vanderbilt L. Rev. 405, 411-412 (1970). Thus the instant case fits the classic example of permitting a State, as *parens patriae,* to sue on behalf of its injured and otherwise remediless citizens.

The complaint filed in the present case by the petitioner alleges that the State ". . . brings this action by virtue of its duty to protect the general welfare of the State *and its citizens, acting herein as parens patriae, trustee, guardian and representative of its citizens, to recover damages. . . .*" (R. 50). (Emphasis added). The Court of Appeals ignored this theory of petitioner's case.

This Court has recognized the propriety of the State suing private wrongdoers as the representative of its injured citizens. *Georgia v. Tennessee Copper Co., supra.* In *Missouri v. Illinois,* 180 U.S. 208, 241 (1901) the Supreme Court stated that ". . . if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." In *New York v. New Jersey,* 256 U.S. 298 (1921) the Court stated:

> "The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the State is the proper party to represent and defend such rights. . . ." (at 301-302).

An alternative statement of the standard applied to determine whether an adequate state interest is present to support a suit *parens patriae* is whether a substantial portion of the State's citizens have an interest in the controversy. In *Kansas v. Colorado,* 185 U.S. 125, 142

(1901) the Supreme Court entertained an action *parens patriae* holding that a State had the right to invoke its original jurisdiction "as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens. . . ." In *Land O'Lakes Creameries v. Louisiana*, 160 F.Supp. 387 (E.D. La. 1958), a three-judge Court expressed the standard with regard to "a substantial number" of a State's citizens.

Significantly, the same theory was advanced by the State in its second count in *Georgia v. Pennsylvania Ry. Co., supra*. As noted previously, Georgia sought damages of $10,000,000.00 under these alternate theories of *parens patriae* recovery. In its opinion this Court observed that, as *parens patriae*, the State could utilize the remedies under the antitrust laws to redress injuries to its economy or to the well-being of its citizenry at large and seemed clearly to imply that the State could have recovered damages but for the Interstate Commerce Commission anti-rebate policy.

Moreover, it should be noted that in the landmark *parens patriae* case of *Georgia v. Tennessee Copper Co., supra*, this Court ultimately entered a decree which included a provision that the Tennessee Copper Co. ". . . undertook annually to supply a fund to compensate those injured by fumes from its works. . . ." 237 U.S. 474, 476 (1915).

The argument made by respondents herein, and accepted by the Court of Appeals below, when taken to its logical conclusion, is that although they illegally conspired to inflate the prices for their products and although this pervasive artificial pricing structure occurring in the

major and socially important oil industry injured the economy of the State of Hawaii and illegally extracted large sums of money from the citizen-consumers in that State, the wrongdoers are entitled to retain their illicit profits and defeat the efforts of the State as *parens patriae* to obtain remedial compensation for either the injury which was inflicted upon the economy and well-being of the State, or the injury inflicted upon the hundreds of thousands of citizen-consumers who are without an otherwise effective and available remedy. The law has never and need never be so blind and helpless in the face of such monumental illegality and wrongdoing. Compare: *In Re Permian Basin Area Rate Cases*, 390 U.S. 747, 825-828 (1968); *Wisconsin v. F.P.C.*, 373 U.S. 294 (1963); *California v. F.P.C.*, 296 F.2d 348 (D.C. Cir. 1961); *Guam v. Fed'l Maritime Comm.*, 329 F.2d 251 (D.C. Cir. 1964). Indeed, even taking the most narrow and limited view of the language of Section 4 of the Clayton Act, the numerous *parens patriae* cases cited above recognize that the State of Hawaii here has, as one of its most important aspects of "business", the task of protecting the safety, welfare and property of its citizens. To the extent that the conspiracy here alleged against respondents detracted from the State ability to perform this important business function, then, the State of Hawaii was injured and has standing to remedy that injury to its business under Section 4.

But this Court should not be content with so narrow a reading of the antitrust laws. Instead, the present petition for a writ of certiorari should be granted to enable the Court to reassert the validity of *Georgia v. Pennsyl-*

vania Ry. Co., supra, and the numerous other cases cited herein which broadly construe the availability of the civil damage remedy as a necessary component to the enforcement of national antitrust policy. This important federal interest can be achieved only by this Court's rejection of the ruling of the Court of Appeals, the effect of which necessarily permits antitrust violators to retain the enormous profits derived from their illicit practices.

CONCLUSION

For the reasons stated above, this Honorable Court should grant the petition for writ of certiorari sought herein by the State of Hawaii.

Dated, December 1, 1970.

Respectfully submitted,

BERTRAM KANBARA,
Attorney General, State of Hawaii,
GEORGE PAI,
Deputy Attorney General,
LAW OFFICES OF JOSEPH L. ALIOTO,
MAXWELL M. BLECHER,
PETER J. DONNICI,
By MAXWELL M. BLECHER,
PETER J. DONNICI,
Counsel for Petitioner.

(Appendices Follow)

Appendix I

In the United States District Court
for the District of Hawaii

Civil No. 2826

Filed: July 2, 1969

State of Hawaii,
Plaintiff,

vs.

Standard Oil Company of California, Union Oil Company of California, Shell Oil Company, and Chevron Asphalt Company,
Defendants.

DECISION ON PLAINTIFF'S PARENS PATRIAE COUNT

The State of Hawaii brought this antitrust action against three oil companies and a subsidiary of one, alleging in Count I of its Fourth Amended Complaint, basically, that the defendants violated Sherman 1 and 2 by bid rigging, price fixing, market monopolization, and other acts in restraint of trade, and asks for damages based upon the illegal excess prices paid for defendants' products by the State in its proprietary capacity, as a buyer of petroleum products.

In Count II the State "brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged."[1] Plaintiff continues to allege that the combination and conspiracy of the defendants in restraint of trade and to monopolize the sale, marketing and distribution of refined petroleum products has "injured and adversely affected the economy and prosperity of the State of Hawaii" by:

> "(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;
>
> "(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;
>
> "(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
>
> "(d) the full and complete utilization of the natural wealth of the State has been prevented;
>
> "(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;
>
> "(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;
>
> "(g) the Hawaii economy has been held in a state of arrested development."[2]

---

[1]Fourth Amended Complaint, Paragraph 19.
[2]Fourth Amended Complaint, Paragraph 20.

Plaintiff then alleges it "has not yet ascertained the precise extent of said damage to itself and its citizens;" but asked leave to insert such sum when ascertained.[3]

Defendants moved to dismiss Count II—maintaining (a) "there can never be a *parens patriae* suit for damages; such a suit lies only in equity, and only for preventive relief;" (b) "Count II does not in fact allege any injury to the general economy of the State of Hawaii, or to Hawaii in its sovereign or quasi-sovereign capacity, that would support a *parens patriae* injunction;" (c) a *parens patriae* suit for damages is not maintainable under Section 4 of the Clayton Act which permits damages only to business and property, arguing that damages to a state's business or property are by definition and nature not damages to its sovereignty or quasi-sovereignty; (d) if dollar damages to the economy of the State were measured by the harm done to the individual inhabitants, there would be created the risk of double recovery, inasmuch as each of the State's inhabitants, in theory at least, would be entitled to sue for any direct damage to his own business or property; and (e) a *parens patriae* suit for damages under the antitrust laws will not lie because an injury to the state's sovereignty is by its very nature too remote or speculative to be measurable in money damages.

The problem has been twice fully briefed and argued by all parties.[4]

---

[3]Plaintiff's Count III pled a class action. Defendants' motion to dismiss this count was granted in an oral bench decision, after briefing and argument.

[4]In plaintiff's Third Amended Complaint, the allegations of Count II flirted with the theory of a *parens patriae* claim, and on defendants' motion to dismiss, it was briefed by both plaintiff and

The concept of a *parens patriae* count in an antitrust action of the nature of the present one, emanates from *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), where the Supreme Court granted the State of Georgia's motion to file an amended complaint which alleged and sought relief from an antitrust violation by twenty railroad companies. The amended complaint asserted four counts of injury, the Third and Fourth of which sought treble damages for the alleged discriminatory freight rates charged the State and its citizens.[5] The Supreme Court held that Georgia had properly asserted a cause of action for injunctive and *damage* relief as *parens patriae* as well as proprietor, and permitted the complaint involving the Court's original jurisdiction to be filed. The Court stated:

> "Georgia, suing for her own injuries, is a 'person' within the meaning of § 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. . . . *But Georgia is not confined to suits designed to protect only her proprietary interests.* The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy [which] . . . injured the economy of Georgia. . . . When it came to other *sanctions* Congress . . . authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil *remedies*, it restricted

---

defendants as if it had been properly alleged. This court in a prior Memorandum Decision found that a *parens patriae* claim had not been pleaded and dismissed the count with leave to amend. Thus, all parties were given two shots at the same target.

[5] In its supporting brief (page 8) the State of Georgia indicated that it was "not primarily interested in seeking damages for past injuries to the State and her citizens . . . [but in] the future welfare of the State and her people."

the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.*" 324 U.S. at 447. (Emphasis added.)

"Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil *sanctions* of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail." 324 U.S. at 452. (Emphasis added.)

After allowing the State of Georgia to file its complaint seeking both equitable and legal relief and stating that all civil antitrust sanctions are available to the State in both its proprietary and *parens patriae* capacities, the Court ruled that damages based on the allegedly excessive freight rates would not be permissible, solely because they had been approved by the ICC and were therefore "legal" rates.[6] This is the only case which either counsel or the court has uncovered which lends precedential support to the claim that a state may recover money damages, trebled, in an antitrust action under the aegis of a *parens patriae* claim.

There are many cases, however, which have passed upon the primary problem of whether a state has sufficient interest in a controversy to be entitled to sue as *parens patriae*. In the determination of the state's standing to sue, each case poses a question of law which can

---

[6]See *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156 (1922) and *Marnell v. United Parcel Service*, 260 F.Supp. 391, 406 (N.D.Cal. 1966).

be determined only by an analysis of the particular facts concerned. Generally it has been the Supreme Court which has determined whether a state has properly stated a claim as *parens patriae*. This is because of the Court's original jurisdiction over controversies between states or between a state and citizens of another state. In passing upon the appropriateness of a *parens patriae* claim, the Supreme Court acted in its capacity as a finder of fact, thus performing a function usually undertaken by a lower tribunal. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907), the Supreme Court permitted the State of Georgia to sue to enjoin fumes from a copper plant across the state border from injuring land in five (5) Georgia counties, very little of which was owned by the State, stating:

> "... [W]e are satisfied by a *preponderance of evidence* that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case [parens patriae]. ..." (Emphasis added.)

Based on its view of the facts, the Supreme Court has entertained suits *parens patriae* to (a) restrain diversion of water from an interstate stream, *Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907); (b) enjoin changes in drainage which increase the flow of water in an interstate stream, *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); (c) preclude restraints on the commercial flow of natural gas, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); and (d) restrain the discharge of sewage into the Mississippi River and New York Bay, *Missouri v. Illinois and Chicago District*, 180 U.S. 208 (1901) and *New York v.*

New Jersey, 256 U.S. 296 (1921). See also *Pennsylvania v. West Virginia*, *supra* at 592, where the Supreme Court, after finding a sufficient basis for a suit *parens patriae*, distinguished certain prior opinions on the ground that "*the facts on which they turned*, as the opinions show, were so widely different from those here that they are not in point." (Emphasis added.)

Conversely, the Supreme Court has rejected the propriety of suits *parens patriae* to (a) enforce claims of a bank's creditors and depositors, *Oklahoma v. Cook*, 304 U.S. 387 (1938); (b) collect claims against another state, which claims, prior to assignment, belonged to citizens of the prosecuting state, *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); (c) recover for injury allegedly resulting from unlawful freight rates charged its citizen-shippers, *Oklahoma v. A.T. & Santa Fe Ry.*, 220 U.S. 277 (1911); and (d) enjoin alleged interference with interstate commerce resulting from state quarantine regulations, *Louisiana v. Texas*, 176 U.S. 1 (1900).

An analysis of the above cases indicates that if a state is to maintain an action in its *parens patriae* capacity, *initially* the facts must show that the state has an interest "independent of and behind the titles of its citizens," *Georgia v. Tennessee Copper Co.*, *supra*; "has an interest apart from that of the individuals affected," *Pennsylvania v. West Virginia*, *supra*; "must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest," *Oklahoma v. Cook*, *supra*; "[it] must appear that the controversy to be determined is . . . not a controversy in the vindication of grievances of particular individuals,"

Louisiana v. Texas, supra. Thus the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The two *theories for recovery* of damages are separate and distinct. (At this stage, we do not concern ourselves with the nature of proof.) So, here, the State in the guise of *parens patriae* cannot recover for the individual and several possible damage claims of its many citizen-consumers of petroleum products. As the preceding cases unmistakably set forth, and as the dissent in *Georgia v. Pennsylvania R. Co., supra,* points out:

> "The inhabitants of the State who have suffered injury or who are threatened with injury by the unlawful practices alleged . . . . are alone entitled to seek a legal remedy for their injury, and are the proper parties plaintiff in any suit to enforce their rights which are alleged to have been infringed. It has long been settled by the decisions of this Court that a State is without standing to maintain suit for injuries sustained by its citizens and inhabitants for which they may sue in their own behalf." 324 U.S. at 473.

The cases also make manifest a *second prerequisite* which must be met before a state may sue in *parens patriae*, viz., the state has standing to sue in that capacity only if a substantial portion of the inhabitants of the state are adversely affected by the challenged acts of the defendants, For example:

> ". . . [T]he interests of the single industry here involved must be held to be private interests, not interests *affecting the whole economy* or *all the people of the state.* This type of interest is insufficient to

give Minnesota the right to sue as parens patriae on behalf of all, or a *substantial number*, of her citizens." *Land O'Lakes Creameries v. Louisiana*, 160 F.Supp. 387, 389. (Emphasis added.)[7]

". . . [T]he mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae*, trustee, *guardian* or representative of *all or a considerable portion of its citizens*. . . ." *Kansas v. Colorado*, *supra*, at 99. (Emphasis added.)[8]

Thus, if a "substantial number", "or a considerable portion of [Hawaii] citizens" are adversely affected by the alleged acts of the defendants, Hawaii would have the requisite standing to sue as *parens patriae* on behalf of the totality of those citizens. While a state may not sue, *parens patriae*, for the recovery of possible individual damages or claims of its inhabitants, nevertheless if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity.

As was conceded by counsel and as this court would judicially notice, there are almost 300,000 motor vehicles operating in this state with approximately 800,000 inhabitants. If more facts were needed, in this State where the grass never ceases to grow, gasoline-powered lawn mowers are as thick as the proverbial fleas on a dog.

---

[7]See also *Jones, Governor ex rel. Louisiana v. Bowles*, 322 U.S. 707 (1944).

[8]See also *Kansas v. Colorado*, 185 U.S. 125, 142 (1902) and *Missouri v. Illinois & Chicago District*, *supra*, at 241.

These two categories, of course, do not cover all of the engines in Hawaii that are powered by petroleum products. The court would judicially notice that there is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other petroleum products referred to in the present complaint, and perforce therefore, the cost thereof.

Hawaii meets each of the two primary requirements for a valid *parens patriae* cause of action and may maintain this suit as *parens patriae*, acting on behalf of her citizens.[9]

There is no merit in defendants' claim that there can never be a *parens patriae* suit for damages; that such a suit lies only in equity and only for preventive relief. *Georgia v. Pennsylvania R. Co., supra, unequivocally* determines that Georgia was [and ergo Hawaii is] "a 'person' entitled to enforce the civil sanctions of the anti-trust laws." (324 U.S. at 452) The civil sanctions of the antitrust laws certainly include recovery of damages from violators thereof. As indicated earlier, the Court in denying Georgia the right to recover damages from the railroad, did so only because of the prior ruling of the Court in *Keogh v. Chicago N.W.R. Co., supra,* note 6. *Keogh* was also a suit for damages under Section 7 of the Sherman Act, 26 Stat. 210, wherein the Court determined that even though a rate-making conspiracy may have existed between the defendant railroads, neverthe-

---

[9]*Georgia v. Tennessee Cooper Co., supra; Missouri v. Illinois, supra; Pennsylvania v. West Virginia, supra.*

less, for the purpose of a suit for damages, a rate, fixed by the Commission, until suspended or set aside, was for all purposes the legal rate as between shipper and carrier, and denied Keogh's antitrust action. Absent the impact of the *Keogh* decision, the only rational inference to be drawn from *Georgia v. Pennsylvania R. Co.*, is that an antitrust suit for treble damages was properly pled by Georgia in its *parens patriae* capacity. Certainly the broad objectives of the antitrust statutes are not to be meanly or narrowly curtailed because it is a state that brings a damage claim thereunder, in a *parens patriae* capacity.

Although defendants urge that Count II "does not in fact allege any injury to the general economy of the State of Hawaii", this conclusatory argument is nullified by subparagraphs (c), (d), (e), (f) and (g) of paragraph 20 of plaintiff's complaint.[10] (See page 2, *supra.*)

Defendants additionally argue that any possible recovery by the State under a *parens patriae* theory must be apart from any recovery for an injury to the business or property of the State in its proprietary capacity. Defendants continue that the antitrust statutes allow damages to be recovered only for injury to "business or property." 15 U.S.C. § 15. Their position is that an injury to the economy of the State cannot be an injury to the State's "business or property."[11]

---

[10] Allegation (a) is most ambiguous and allegation (b) becomes intelligible only if the word "affect" is construed to mean "offset". See plaintiff's Count II, *supra.*

[11] Defendants cite *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 732 (8 Cir. 1964), as authority for the statement that the damage or injuries must be something different from that

U.S. v. Addyston Pipe and Steel, 85 Fed. 271 (1898), long ago said that a public body is injured in its "property" when it is forced to pay more for a commodity than it would absent a conspiracy. If the economy of a state can be injured, then that economy is finite and can fall within a definition of the word "property", even though it does not fall within the normal, simple definition of "business and property" under Section 4 of the Clayton Act. As indicated above, *Georgia v. Pennsylvania R. Co.*, lays at rest defendants' semantic argument. It clearly there differentiated between suits for damages in the State's proprietary capacity and suits for damages in its quasi-sovereign capacity and held that damages to the State's economy, if proved, were recoverable as a distinct injury, severable from whatever injury it might suffer in its proprietary capacity.[12]

There can be no risk of double recovery from the plaintiff for any single damage. As previously stated, a *parens patriae* action cannot be brought to recover the individual damages of the State's inhabitants. If the State cannot prove injury to the State's economy—an injury completely severable from the injuries to its individual inhabitants, then of course it could recover no money damages. On this point, as well as in defendants' claim that an injury to the State's economy is of a nature too remote or speculative to be measurable in money

---

sustained by the community or general public. The words are convenient for defendants' argument, but the facts of that case have no application to the *parens patriae* problem before the court.

[12] "But Georgia is not confined to suits designed to protect only her proprietary interests," and continued, ". . . we find no indication that, when Congress fashioned those civil [antitrust] *remedies*, it restricted the States to suits to protect their proprietary interests." 324 U.S. at 447. (Emphasis added.)

damages (and cannot in any event be damages to a "state's business and property"), defendants move out of the area of pleading into the area of proof at trial. This case is at the pleading stage. Hawaii has pled a *parens patriae* cause of action that cannot be summarily dismissed. How it will prove its damage, what type of evidence will be offered, how the quantum of alleged damage is to be measured, are problems to be met *in futuro*, problems that will be dealt with at the proper time in the light of *Southern Photo Materials, Story Parchment Co., Bigelow*, and *Continental Ore*.[13]

Defendants' motion to dismiss Count II is Denied.
Dated: Honolulu, Hawaii, this 1st day of July, 1969.

/s/ Martin Pence,
United States District Judge

[13] *Eastman Kodak v. Southern Photo Materials*, 273 U.S. 359 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251 (1946); *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

Appendix II

In the United States Court of Appeals
for the Ninth Circuit

No. 24,603

State of Hawaii,
Plaintiff-Appellee,
vs.
Standard Oil Company of California, Union Oil Company of. California, Shell Oil Company, and Chevron Asphalt Company,
Defendants-Appellants.

[September 25, 1970]

On Appeal from the United States District Court
for the District of Hawaii

Before: MERRILL, WRIGHT and TRASK, Circuit Judges

MERRILL, Circuit Judge

This appeal presents the question whether a state can, under §4 of the Clayton Act, 15 U.S.C. §15,[1] maintain a

[1] "§15. *Suits by persons injured; amount of recovery.*
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

suit for treble damages as *parens patriae* for injury done to the general economy of the state. We hold it cannot.

The amended complaint filed by the State of Hawaii alleges that appellants conspired to fix and maintain unreasonably high prices for motor gasoline and asphalt in Hawaii. Count I alleges losses suffered by the state in its proprietary capacity. Count II, with which we are concerned, alleges:

> "The State of Hawaii • • • brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged."

The complaint then continues:

> "The unlawful contracts • • • have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:
>
> • • • • •"

Then are listed the seven specifications of injury set forth in the margin.[2]

---

[2] "(a) revenues of its citizens have been wrongfully extracted from [the economy of] the State of Hawaii;
(b) taxes affecting the citizens and commercial entities have been increased to [offset] such losses of revenues and income;
(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
(d) the full and complete utilization of the natural wealth of the State has been prevented;
(e) the high cost of manufaucture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;
(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

The prayer is for injunction and for treble damages under §4 of the Clayton Act. Respecting damages under Count II, the complaint alleges:

> "Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when such amount has been ascertained, plaintiff will ask leave of court to insert said sum herein."

Appellants moved to dismiss Count II on the ground that it failed to state a claim. The motion was denied.[3] The opinion of the court in support of its order appears at 301 F.Supp. 982 (D.C. Hawaii 1969). This appeal is taken from the court's order pursuant to 28 U.S.C. §1292(b).

Appellants attack Count II on many grounds. They contend that *parens patriae* suits will not lie to recover money damages. They contend that injury to the general economy of a state is not susceptible of computation or of proof, and that allegations of such injury should not be recognized as presenting a justiciable case or controversy. The basis of our disposition of the case makes it unnecessary to reach these issues. We hold only that damages for injury done to the general economy of a state are not recoverable by the state under §4 of the Clayton Act.

(g) the Hawaii economy has been held in a state of arrested development."

(The bracketed language is included in response to Hawaii's assertion that it serves to correct typographical error in the complaint as filed.)

[3]The complaint, in a third count, attempted to state a class action claim under Rule 23, Fed.R.Civ.P., on behalf of the state and all citizens who have purchased products from appellants. This count was dismissed by the court and no appeal has been taken from that order.

Hawaii relies (as did the District Court) on *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). Georgia, invoking the original jurisdiction of the Supreme Court (Art. III, §2 of the Constitution), there sought leave to file a complaint against twenty railroad companies charging a conspiracy to fix arbitrary and noncompetitive freight rates to and from Georgia so as to prefer the ports of other states over those of Georgia. The nature of the injury allegedly suffered by Georgia is similar to that here alleged by Hawaii (see footnote 2).

Leave was granted. The Court stated:

> "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected." 324 U.S. at 451.

And:

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. * * * Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts." 324 U.S. at 447.

As the Court made clear, however, it was concerned with the relief offered by §16 of the Clayton Act.

> "Sec. 16 of the Clayton Act provides for relief by injunction 'when and under the same conditions and principles as injunctive relief against the threatened conduct that will cause loss or damage is granted by courts of equity.' Those requirements are sufficiently satisfied to justify a filing of this bill. It must be remembered that this is a suit to dissolve an illegal combination or to confine it to the legitimate area of collaboration." 324 U.S. at 460.

And:

> "Dissolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here." 324 U.S. at 462.[4]

Section 16, 15 U.S.C. §26,[5] is far broader than §4. Any person may secure injunctive relief against threatened loss or damage by violation of the antitrust laws. Section 4 provides for recovery of treble damages only by a person injured in his business or property by such a violation.

Hawaii's claim does not constitute an effort to prevent unjust enrichment by the wrongdoers through recovery by the state, for the affected consumers or for itself, of the total of direct injuries suffered by persons who

---

[4]Thus the Court in *Georgia* did not specifically rule on the question whether damages are recoverable in *parens patriae* suits. As we have noted, we do not reach that question here.

[5]Section 16 provides in part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings * * *."

are unable to seek recovery for themselves.[6] Hawaii's claim is over and above all such recovery by persons, or on behalf of classes, and is asserted to have independent existence quite apart from such direct injuries. In light of Hawaii's inability yet to articulate a more precise theory or measure of such damages, we are skeptical of the existence of an independent harm to the general economy. The general economy is an abstraction. It has no value in itself, save as it may (in a representational capacity on behalf of business and property generally) serve to confer value on the specific items of business or property it affects. It exists only as a reflection of the business or property values it represents.

Nevertheless, assuming *arguendo* that the general economy can suffer injury from antitrust violations independent of the injuries suffered by private persons or by the state in its proprietary role, we hold upon two closely related grounds that Hawaii's claim for money damages does not fall within §4.

1. An injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary capacity, engage in business. For injury suffered in these respects a state can recover under §4. *Georgia v. Evans*, 316 U.S. 159 (1942). Such was the basis for Hawaii's Count I. But the terms "business or property" are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community. *E.g., Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); *Duff v. Kansas City Star Co.*, 299 F.2d 320 (8th Cir.

[6] As noted (footnote 3, *supra*), Hawaii's class action was dismissed and is not before us.

1962); *Roseland v. Pfister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942). Unless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly.

2. Accepting that the general economy can suffer injury from antitrust violations, such injury is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection. It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955). Accordingly, it has been held that shareholders, *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958); lessors, *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); creditors, *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910); patent owners suing for loss of royalties, *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955); and others of like remoteness lack standing to obtain damages under the antitrust laws.

The attenuated injuries alleged by Hawaii fall far outside the area of directness contemplated by the Clayton Act. Compensation of the public (let alone treble damages) for injury of such an extraordinary character presents policy questions which, in our view, should be subjected to close Congressional inquiry and study. We do not believe that §4 as it now stands can be construed to make such recovery available.

Reversed and remanded with instructions that Count II of Hawaii's amended complaint be dismissed.